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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 249

CLINTON S. LUTKINS, SIDNEY W. DAVIDSON and UNITED STATES TRUST COMPANY OF NEW YORK, as executors of the last will and testament of George Arents, deceased, and United States Trust Company of New York, as executor of the last will and testament of Lena R. Arents, deceased,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

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POINT I

The Government, in its Brief in Opposition, frames the "Question Presented" in a manner which tends to mislead and which conceals facts which show compliance with the statute.

It reads in part:

"The question presented is whether the acquisition by one corporation of 29.489 percent of the total stock of another in exchange for voting stock, qualifies as a tax free reorganization where, because of the acquiring company's existing hold-

> ings of such stock, acquired in part for cash, the acquisition results in its owning more than 80 percent of the stock."

This language does not reveal that in our case over 80 percent of the stock was acquired solely in exchange for voting stock of the acquiring corporation, as required by the statute, and as found by the Court of Claims, and it carries the implication that the cash purchases must be added in order to complete the acquisition of the 80 percent. The Government seems to assume that the statute provided that all acquisitions of stock be made solely in exchange for the voting stock of the acquiring corporation. The legislative history of section 112(g)(1)(B) shows that Congress believed that the acquisition of 80 percent (rather than a bare majority, as in the prior law) of the voting stock of the corporation being acquired, solely in exchange for the voting stock of the acquiring corporation (to insure continuity of interest and control) was sufficiently similar to a statutory merger or consolidation to be entitled to the same tax treatment.

The question presented is therefore, precisely as stated in the petition, namely, whether a reorganization is prevented by the purchase of additional voting stock for cash.

In the first part of its argument the Government states that since, in the course of acquiring 80 percent of International's stock American acquired 2.691% of the stock for cash the acquisition was not "in exchange solely * * * for voting stock". This is an attempt to convince this Court, as the Court of Claims apparently concluded, that the cash *purchases* were

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part of the *exchanges*, despite the fact that they were made in years other than the years of the exchanges. This ignores the provisions of the Government's own regulations, quoted in Appendix B, p. 2 of the petition, which distinguish an exchange as "a reciprocal transfer of property" from a cash purchase, "a transfer of property for a money consideration only". The *exchanges* were solely for stock and for more than 80 percent of the stock.

POINT II

The Government errs in stating that there is no conflict between the decision of the Court of Claims in the instant case and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Howard* v. *Commissioner*.

The Government persists in its erroneous contention which it made before the Court below to the effect that the *Howard* case was overruled by this Court in *Turnbow* v. *Commissioner*, 368 U.S. 337.

The *Howard* case was not overruled as it was not before this Court and the facts in that case are easily distinguishable from those in the *Turnbow* case. The facts in the *Turnbow* case showed clearly that the requirements of the definition of "reorganization" in the Internal Revenue Code of 1939 were not met as only 30 percent of the stock was acquired solely for voting stock of the acquiring corporation, whereas in the *Howard* case 80.19 percent was acquired solely for voting stock, or an amount in excess of the percentage required by the statute. In the *Howard* case, therefore, in the words of Mr. Justice Whittaker "some

part, at least, of the property exchanged *actually* meets the particular description contained in the applicable section or subsection of the Code."

There is nothing in the *Turnbow* decision to indicate that the *Howard* decision would have been reversed if it had been considered by this Court and in fact the *Turnbow* opinion contains a cautionary statement against giving it too wide application. This is the only possible interpretation of the statement, 368 U.S. at 344: "That holding determines this case and *is all we decide.*" (Emphasis supplied.)

POINT III

The question presented is not a "dead issue."

In item (2) of its argument the Government contends that the "question presented by this case is a dead issue which does not require resolution by this Court" apparently on the ground that under the 1954 law "an exchange of the sort here involved" would be nontaxable. There is no statement, however, as to whether other taxpayers have open cases, still undecided, involving similar facts under the 1939 law, and to whom the issue would in no event be a "dead issue".

The Government cites the statement by the Senate Committee on Finance, (S. Rep. No. 1622, 83rd Cong., 2d Sess., 273) dealing with the bill which became the Internal Revenue Code of 1954, to the effect that "there is doubt as to whether the existing statute permits such an acquisition tax free when the acquiring corporation already owns some of the voting stock of

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the other corporation". Some writers have thought that the Senate exaggerated the doubt in this area.[1]

The question presented by this case and decided by the Court of Claims, erroneously it is believed, is by no means "a dead issue" but is one which will arise also under the Internal Revenue Code of 1954, and will persist until it has been decided authoritatively by this Court. Each Code involves, in the definition of a Type B reorganization, an "acquisition" of stock of one corporation "in exchange solely for all or a part of" the voting stock of another corporation, the acquiring corporation. In the instant case the Court of Claims found as a fact that the requisite percentage of shares had been acquired in exchange solely for voting stock of the acquiring corporation but in spite of this the Court held that the "acquisition" did not result in a "reorganization". The Court of Claims aggregated the cash "purchases" made in other years with the "exchanges solely for voting stock" and held that the acquisition was not "solely for voting stock".

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[1] See Merritt "Tax-Free Acquisition of Corporate Business", New York University Thirteenth Annual Institute on Federal Taxation, 1955, p. 722:

> The Senate Report overstates somewhat the area of doubt existing under the 1939 Code. The "tacking on" problem was probably not serious if the taxpayer could prove that all the stock acquisitions, including those previously made, were made in exchange solely for voting stock of the acquiring corporation.

In this statement Mr. Merritt himself "overstates" the requirements of the 1939 Code as he seems to be under the impression that the statute requires that *all* the stock acquired be acquired in exchange solely for voting stock of the acquiring corporation. The Court of Claims may have also been under the same impression. All that the 1939 statute required was that at least 80 percent be acquired in exchange solely for voting stock and there is no provision as to time of acquisition or the number of exchanges required for "the acquisition".

What is to prevent, therefore, the Court of Claims, or any other Federal Court, in a case arising under the Internal Revenue Code of 1954, from aggregating cash purchases of stock in earlier years with acquisitions in exchange solely for voting stock in the taxable year and deciding that the provisions of section 368(a)(1)(B) of the Internal Revenue Code were not met? It is the fear of such a result as reflected in the statement by Maremont Corporation quoted on p. 10 of the Petition, that indicates the continuing uncertainty in this area of the tax law and which makes clarification by this Court so important and desirable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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